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No. 86-4

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOSE G. CANTU AND SHIRLEY A. FONTENOT, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' representation at trial by the same attorney denied them the effective assistance of counsel.

2. Whether trial counsel's failure to seek a severance constituted plain error.

3. Whether the district court committed plain error in allowing petitioners' counsel to introduce evidence that a co-defendant had been convicted of the same charges at a separate trial.

4. Whether the district court abused its discretion under Fed. R. Crim. P. 32(c) in sentencing petitioners without first ordering a presentence report.

5. Whether petitioners were denied the effective assistance of counsel on appeal.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. Al-A8) is reported at 774 F.2d 1305. The opinion of the court of appeals on rehearing (Pet. App. A9-A11) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 1985, and a petition for rehearing was denied on April 9, 1986. The petition for a writ of certiorari was filed on June 9, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner Cantu was convicted on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 286; seven counts of filing

false claims against the United States, in violation of 18 U.S.C. 287; one count of theft of government money by converting a tax refund check, in violation of 18 U.S.C. 641; and nine counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioner Fontenot was convicted on one count of filing a false claim and two counts of mail fraud.[1] Petitioner Cantu was sentenced to a total of six years' imprisonment, to be followed by a five-year term of probation, and was ordered to pay $15,000 restitution (1 R. 48).[2] Petitioner Fontenot was sentenced to 18 months' imprisonment, to be followed by a three-year term of probation (*id.* at 47).

1. The evidence at trial, the sufficiency of which is not disputed, is summarized in the original court of appeals opinion (Pet. App. A2-A3). Briefly, in 1982 and 1983 petitioner Cantu, an accountant, conspired with Steven M. Austin to file false income tax returns and thereby to collect tax refunds to which they were not entitled.[3] Cantu filled out the false returns and fabricated the accompanying W-2 forms. As part of this scheme, Cantu and petitioner Fontenot, Cantu's secretary, filed a false 1981 tax return in Fontenot's name. This return, which Cantu filled out and Fontenot signed, claimed a refund of $30,042 based on a false W-2 that stated that Fontenot had earned $39,850 while working for an oil company; in fact, Fontenot had earned $18,378 in 1981 and the oil company named in the W-2 proved to be fictitious. Fontenot also signed and forwarded to the IRS a letter confirming her phony claim for the 1981 tax refund. Overall, petitioners and Austin submitted

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[1]Fontenot was acquitted by the district court on 15 other counts before the case was submitted to the jury (II Tr. 22, 84).

[2]"R." refers to the record in the court of appeals.

[3]Austin was indicted with petitioners and was convicted at a separate trial. Austin's conviction was affirmed on appeal. *United States* v. *Austin*, 774 F.2d 99 (5th Cir. 1985).

claims for more than $220,000 through this tax fraud scheme. Pet. App. A2-A3; I Tr. 64-73, 84-86, 89-91, 114-141; II Tr. 22-23, 27.

2. On appeal, petitioners raised only a challenge to the admission into evidence of materials and documents—primarily copies of false tax returns and bogus W-2 forms—that had been seized during a search of Cantu's office. The court of appeals affirmed (Pet. App. A1-A8). It held that the warrant to search Cantu's office was not overbroad, that all of the items seized were properly within the authority of the warrant, and that the warrant adequately described the area to be searched (*id.* at A6-A7).

Petitioners then retained new attorneys and filed a petition for rehearing. In the petition, they raised four new issues. First, petitioners claimed that their right to the effective assistance of counsel had been denied because they had been represented at trial by the same attorney. Second, they asserted that the trial court had erroneously allowed evidence to be introduced that co-defendant Austin was convicted of the same charges at a separate trial. Third, petitioners contended that the trial court had misapplied Fed. R. Crim. P. 32(c)(1) by sentencing them without ordering a presentence report. Finally, they claimed that they had been denied the effective assistance of counsel on appeal.

The court of appeals denied rehearing in an opinion addressing the new issues raised in the rehearing petition. (Pet. App. A9-A11). The court held (*id.* at A10 n.1) that the introduction of the co-defendant's conviction was not error because defense counsel had himself elicited this evidence and had not objected to its admission at trial. The court also concluded (*ibid.*) that the district judge did not violate Rule 32(c)(1), because in refusing to order a presentence report he expressly found that he already had sufficient information for sentencing purposes and thereafter afforded

petitioners and their attorney ample opportunity for allocution at sentencing. Next, the court held (Pet. App. A10-A11) that petitioners' joint representation at trial did not deny them the effective assistance of counsel. The court pointed out that the defendants had a common defense, that petitioners had expressly waived any claim of conflict of interest, and that counsel's failure to move for a severance did not reflect any actual conflict since a severance was unwarranted. Finally, the court determined (*id.* at A11) that petitioners had not been denied the effective assistance of appellate counsel because their attorney "was under no obligation to raise other meritless issues on appeal."

ARGUMENT

1. Petitioners contend (Pet. 5) that "an actual conflict of interest existed in their joint representation and that the conflict adversely affected their attorney's performance." The court of appeals' decision rejecting this claim (Pet. App. A10-A11) is correct and does not conflict with any decision of this Court or of another court of appeals. Further review is therefore unwarranted.

a. In *Holloway* v. *Arkansas*, 435 U.S. 475 (1978), this Court held that "permitting a single attorney to represent codefendants * * * is not *per se* violative of constitutional guarantees of effective assistance of counsel" (435 U.S. at 482). Moreover, the Court held in *Holloway*, "a defendant may waive his right to the assistance of an attorney unhindered by a conflict of interests" (*id.* at 483 n.5). As petitioners acknowledge (Pet. 10), prior to trial the district court inquired whether petitioners' joint representation constituted a conflict of interest; at that time, petitioners neither asserted nor demonstrated any such conflict. To the contrary, petitioners executed a written form entitled "Joint Representation by Counsel—Waiver of Conflict of Interest." Under these circumstances, petitioners waived any purported conflict of interest. The court of appeals so held

and its decision is consistent with those of the other circuits. See, *e.g.*, *United States* v. *Fahey*, 769 F.2d 829, 834-835 (1st Cir. 1985); *United States* v. *Noble*, 754 F.2d 1324, 1332-1335 (7th Cir. 1985); *United States* v. *Blum*, 753 F.2d 999, 1002-1006 (11th Cir. 1985).[4]

b. In addition, petitioners have failed to show that the attorney by whom they were jointly represented "actively represented conflicting interests" and that "an actual conflict of interest adversely affected [their] lawyer's performance." *Cuyler* v. *Sullivan*, 446 U.S. 335, 348, 350 (1980); accord, *Strickland* v. *Washington*, 466 U.S. 668, 692 (1983). As the court of appeals noted (Pet. App. A10), petitioners had a joint defense at trial: each denied responsibility for the fraudulent tax scheme, and neither blamed the other for the unlawful transactions. Under these circumstances, the court of appeals was plainly correct in rejecting petitioners' belated claim of conflict. See, *e.g.*, *United States* v. *Elkins*, 774 F.2d 530, 541 (1st Cir. 1985); *United States* v. *Burney*, 756 F.2d 787, 793 (10th Cir. 1985); *United States ex rel. Cole* v. *Lane*, 752 F.2d 1210, 1220 (7th Cir. 1985).[5]

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[4]Petitioners' assertion (Pet. 10) that this waiver was ineffective because "at the time petitioners did not realize or understand the true implications of a joint trial" is not supported by any facts in the record. Their further argument (*id.* at 10-11) that the district court failed to renew the inquiry about a possible conflict once the trial was underway is meritless. See, *e.g.*, *United States* v. *Smith*, 778 F.2d 925, 930 (2d Cir. 1985)("there is no requirement that parties who have received adequate warnings on the dangers of joint representation be warned again after the trial begins").

[5]Contrary to petitioners' contentions (Pet. 6-7), Fontenot's testimony did not inculpate Cantu in any respect. Fontenot testified that she had "no idea" who completed the fraudulent returns, that she had not seen Cantu make the false entries, and that Cantu simply "wasn't there" (II Tr. 26-28, 40-42). This testimony was consistent with petitioners' joint theory that any number of people had access to Cantu's files and could

Defense counsel's failure to call Cantu as a witness for Fontenot—ostensibly to exculpate her—also does not demonstrate an actual conflict. Petitioners point to no evidence that Cantu would actually have testified on Fontenot's behalf, thereby waiving his own Fifth Amendment rights and opening himself up to cross-examination by the prosecutor. See *United States* v. *Elkins*, 774 F.2d at 541. Petitioners also fail to show that Cantu had anything exculpatory to say on Fontenot's behalf. While petitioners point (Pet. 8) to Cantu's remarks at the sentencing—stating that Fontenot was "a victim of [Cantu's] schemes"—those statements do not exculpate Fontenot and, in any event, do not establish that Cantu would have offered such testimony at trial.[6]

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have filled out and submitted the fraudulent returns. Similarly, Fontenot's testimony on cross-examination (Pet. 7) that she merely signed a blank return and "didn't see [Cantu complete] it" but "assumed he must have gotten around to doing [her] taxes," did not contradict Cantu's defense. Cantu did not dispute at trial that he was a tax preparer or that he typically instructed his clients to sign blank returns; indeed, Cantu called four witnesses who testified that this was his practice (II Tr. 47-49, 53-55, 57-59, 63-64). Cantu's defense at trial simply did not depend on a claim that he did not ordinarily do Fontenot's taxes; rather, his defense was that he did not fill out the fraudulent 1981 return in issue—a defense that Fontenot's testimony did not contradict.

[6]Nor does the fact that there was more evidence introduced against Cantu than against Fontenot reflect a conflict. As a general principle, "the fact that the evidence against one defendant was somewhat stronger than that against another will not establish a conflict when both relied on the same line of defense." W. LaFave & J. Israel, *Criminal Procedure* § 11.9, at 91 (1984). See *United States* v. *Burney*, 756 F.2d at 793. Cf. *United States* v. *Huntley*, 535 F.2d 1400, 1406-1407 (5th Cir. 1976) ("The fact that one co-defendant is in a policy-making position and the other in a ministerial position does not necessarily constitute any conflict in their joint representation."), cert. denied, 430 U.S. 929 (1977). That was the case here. Moreover, defense counsel had no trouble highlighting the relative paucity of evidence against Fontenot in his closing argument (II Tr. 89-91), and the trial court credited Fontenot's lesser culpability by dismissing all but three counts against her. The disparity of evidence did not prejudice Cantu—and petitioners do not suggest otherwise—in view of the common defense and the overwhelming evidence against Cantu.

2. The contention that the district court's failure to grant petitioners a severance denied them a fair trial is baseless. Since defense counsel never sought a severance in the first place, the failure to grant a severance cannot be reversed unless it constituted plain error under Fed. R. Crim. P. 52(b) by " 'seriously affect[ing] the fairness, integrity or public reputation of [the] judicial proceedings.' " *United States* v. *Young*, No. 83-469 (Feb. 20, 1985), slip op. 14 (quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936)). Plainly, it did not. As the court of appeals held (Pet. App. A11), "petitioners' counsel did not err in failing to move for severance because petitioners' defense theories were the same * * * [and] [s]eparate trials on the same theory would have wasted judicial resources." Petitioners' reasons for a severance (Pet. 13)—that at separate trials Cantu would have "exculpated Fontenot" while at the joint trial Fontenot's testimony "inculpated Cantu"—are unfounded. As noted above (p. 6, *supra*), petitioners point to nothing in the record to indicate that Cantu would actually have testified for Fontenot at a separate trial. See, *e.g.*, *United States* v. *Espinosa*, 771 F.2d 1382, 1408 (10th Cir. 1985), cert. denied, No. 85-5709 (Dec. 9, 1985); *United States* v. *Lyles*, 593 F.2d 182, 192 (2d Cir.), cert. denied, 440 U.S. 972 (1979); *United States* v. *Wofford*, 562 F.2d 582, 586 (8th Cir. 1977), cert. denied, 435 U.S. 916 (1978). And there is no basis to suppose that Cantu's testimony would have been exculpatory. See, *e.g.*, *Espinosa*, 771 F.2d at 1408; *United States* v. *Parodi*, 703 F.2d 768, 780 (4th Cir. 1983); *Wofford*, 562 F.2d at 586. Nor do petitioners show that Fontenot's testimony at the joint trial genuinely inculpated Cantu. See, *e.g.*, *United States* v. *Centracchio*, 774 F.2d 856, 861-863 (7th Cir. 1985); *United States* v. *Sliker*, 751 F.2d 477, 492 (2d Cir. 1984), cert. denied *sub nom.* *Buchwald* v. *United States*, No. 84-6218 (Mar. 18, 1985); *United States* v. *Bautista*, 731 F.2d 97, 100 (1st Cir. 1984). Thus, the court of appeals was correct in concluding that

had trial counsel made the severance motion now urged by petitioners, the district court would have acted well within its discretion in denying it.

3. There is no merit to petitioners' contention (Pet. 14-18) that the trial court committed plain error in allowing evidence to be introduced that co-defendant Austin had been convicted at a separate trial. While the "conviction of a codefendant may not be used as substantive evidence of another's guilt" (*United States* v. *Davis*, 766 F.2d 1452, 1456 (10th Cir. 1985), cert. denied, No. 85-5364 (Oct. 15, 1985)), "it can be admitted for other, proper purposes" (*United States* v. *Melton*, 739 F.2d 576, 578 (11th Cir. 1984)). Here, as part of their overall strategy of blaming Austin for the scheme, it was petitioners themselves who first offered evidence that Austin had been convicted.

Counsel in his opening statement identified Austin as a convicted criminal (I Tr. 44). Thereafter, to support the defense that Austin was the "only guilty person" charged (II Tr. 101), defense counsel elicited on cross-examination that a government witness had "heard that [Austin] was convicted" (II Tr. 17). Finally, in his closing argument to the jury, defense counsel repeatedly emphasized that Austin had "perpetrated this alleged fraud," that it was Austin's scheme, that Austin was "convicted of this" and, as such, that Austin was a "convicted crook" (II Tr. 90-101).[7] The court of appeals correctly concluded that "because * * * defense counsel mentioned this evidence during the trial and four times during closing arguments" (Pet. App. A10), there was no plain error in the admission of the evidence. See *United States* v. *Chilcote*, 724 F.2d 1498, 1504 (11th

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[7]The prosecutor made a single, passing reference to Austin's conviction in his closing argument to the jury, and did not in any way invite the jury to infer petitioners' guilt from the conviction of Austin (II Tr. 86).

Cir.), cert. denied, 467 U.S. 1218 (1984) (no plain error particularly because defendant "himself capitalized on the introduction of the guilty plea"); *Wallace* v. *Lockhart*, 701 F.2d 719, 726 (8th Cir.), cert. denied, 464 U.S. 934 (1983) (no error where introduction of co-defendants' convictions "actually served to bolster the credibility of [defendant's] own testimony"). See also *United States* v. *Roth*, 736 F.2d 1222, 1227 (8th Cir. 1984)(introduction of co-defendant's guilty plea was harmless where "it was the defense counsel that first used the term 'guilty,' and emphasized this testimony during the cross-examination").

Finally, the trial court expressly instructed the jury that it could not use the evidence of Austin's conviction against petitioner Fontenot. And the court cautioned the jury that it could use against Cantu only "Austin's *actions* with regard to the charges"—as opposed to Austin's *conviction* on those charges. II Tr. 110-111 (emphasis added). There is no reason to suppose that the jury failed to follow the court's limiting instructions. See *Opper* v. *United States*, 348 U.S. 84, 95 (1954).[8] The court of appeals' decision rejecting petitioners' belated objection to the introduction of Austin's conviction is thus correct and does not warrant further review.[9]

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[8]Petitioners are mistaken in their contention (Pet. 17-18) that Jury Note No. 2 demonstrates the jury's failure to heed the court's instructions. That note simply asked whether Austin's receipt of fraudulently obtained money could be attributed to Cantu as well, under an aiding and abetting theory (Pet. 17). Nowhere does the note suggest that the jury improperly inferred Cantu's guilt from the prior conviction of Austin; indeed, the note does not mention Austin's conviction.

[9]Petitioners' reliance on *United States* v. *Harrell*, 436 F.2d 606 (5th Cir. 1970), cert. denied, 409 U.S. 846 (1972); *Babb* v. *United States*, 218 F.2d 538 (5th Cir. 1955); and *Leroy* v. *Government of Canal Zone*, 81 F.2d 914 (5th Cir. 1936), is misplaced. In each of those cases the government, not the defendant, elicited the evidence of a co-defendant's conviction and in no instance did the trial court give a limiting instruction.

4. Petitioners' claim (Pet. 18-21) that the trial court violated Fed. R. Crim. P. 32(c) by sentencing them without first ordering a presentence report is meritless. Rule 32(c)(1) expressly provides that the sentencing court may dispense with a presentence report if it "finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record." See, *e.g.*, *United States* v. *McCoy*, 770 F.2d 647, 649 (7th Cir. 1985); *Crooker* v. *United States Parole Comm'n*, 730 F.2d 1, 6 (1st Cir. 1984), vacated and remanded on other grounds, No. 83-2082 (Oct. 29, 1984); *United States* v. *James*, 528 F.2d 999, 1023 (5th Cir.), cert. denied, 429 U.S. 959 (1976). Here, the trial judge expressly found that a report was unnecessary because he had "all the information at hand" that he needed to exercise his discretion (III Tr. 7). Moreover, the court permitted defense counsel to prepare a sentencing memorandum, and accorded counsel and petitioners ample opportunity to speak at sentencing (*id.* at 5-7, 14). Petitioners do not identify any information that they would have made available to the court in a presentence report but failed to present orally. See *Hazelwood* v. *Arnold*, 539 F.2d 1031, 1033 (4th Cir. 1976). Under these circumstances, where the court "observ[ed] the defendant[s] throughout the trial" (*United States* v. *Latner*, 702 F.2d 947, 949 (11th Cir.), cert. denied, 464 U.S. 914 (1983)), and "afforded the defendant[s] and [their] attorney an opportunity to present statements and to bring to the court's attention any mitigating factors" (*Reed* v. *United States*, 529 F.2d 1239, 1241 (5th Cir.), cert. denied, 429 U.S. 887 (1976)), the trial court properly followed the mandate of Rule 32(c). Accord, *United States* v. *Chiantese*, 582 F.2d 974, 981 (5th Cir. 1978), cert. denied, 441 U.S. 922 (1979).[10]

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[10] *United States* v. *Long*, 656 F.2d 1162 (5th Cir. 1981), on which petitioners rely (Pet. 19-21), is easily distinguishable. There, the trial court denied a motion under Fed. R. Crim. P. 35 to reconsider a life

5. Petitioners' final claim (Pet. 22-23) that they were denied the effective assistance of appellate counsel is likewise meritless. This Court has held that the Constitution does not require appellate counsel "to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points." *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983). "Experienced advocates," this Court observed in the *Jones* case, "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible" (*ibid.*). Courts should not "second-guess reasonable professional judgments and impose * * * a duty to raise every colorable claim suggested by a client" (*id.* at 754). Here, defense counsel chose to challenge on appeal only the lawfulness of the seizure of records that were ultimately used to convict both petitioners at trial (Pet. App. A11).[11]

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sentence imposed for murder. The court of appeals reversed and remanded for a new sentencing before another judge. While noting that a court retains the discretion to dispense with a presentence report (656 F.2d at 1164), the court observed that in this instance the trial judge had failed to make any finding at the time of the original sentencing that a report was unnecessary (*ibid.*). Moreover, the trial judge, while promising to read documents submitted by counsel in support of the Rule 35 application, ultimately denied the motion without reading any of them (656 F.2d at 1165). Beyond that, because the trial judge entertained the Rule 35 motion some 18 months after the trial had concluded (656 F.2d at 1165), his "lack of memory of the case"—reflected in excerpts from the proceedings incorporated by the court of appeals in an appendix to the decision (*id.* at 1166-1169)—together with the trial court's "prejudgment" of the appropriate sentence (*id.* at 1165), effectively "reduce[d] the hearing on sentence to a meaningless formality" (*ibid.*). Unlike the trial court in *Long*, the sentencing judge in this case made an express finding that he had sufficient information to exercise his discretion. Moreover, the sentencing followed the trial itself by only a few days, and at the time of sentencing defense counsel and petitioners were given a chance to bring all relevant information to the court's attention.

[11]Contrary to petitioners' contention (Pet. 22), the documents whose seizure was challenged on appeal were, in fact, offered at trial against both petitioners and were relevant to both petitioners' participation in the fraud (I Tr. 154-160; II Tr. 33-35).

That strategic decision does not constitute ineffective assistance, simply because it does not coincide with the legal judgment made by petitioners' new attorneys. See, *e.g.*, *Strickland* v. *Washington*, 466 U.S. 668 (1984); *Sanchez* v. *United States*, 782 F.2d 928, 935 (11th Cir. 1986); *Cantone* v. *Superintendent, New York Correctional Facility*, 759 F.2d 207, 218-219 (2d Cir. 1985). In any event, the court of appeals ultimately considered, on the petition for rehearing, the issues that petitioners now claim should have been raised initially by prior counsel. Petitioners therefore could not have been prejudiced by their original counsel's failure to raise those issues on appeal. Moreover, because those issues are plainly insubstantial, petitioners would not have been prejudiced even if the court of appeals had declined to consider those issues when they were raised for the first time on rehearing. See *Strickland*, 466 U.S. at 693-694.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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